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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 318

SAMPSON TULEE,

Appellant,

vs.

STATE OF WASHINGTON.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

APPELLEES' STATEMENT AS TO JURISDICTION.

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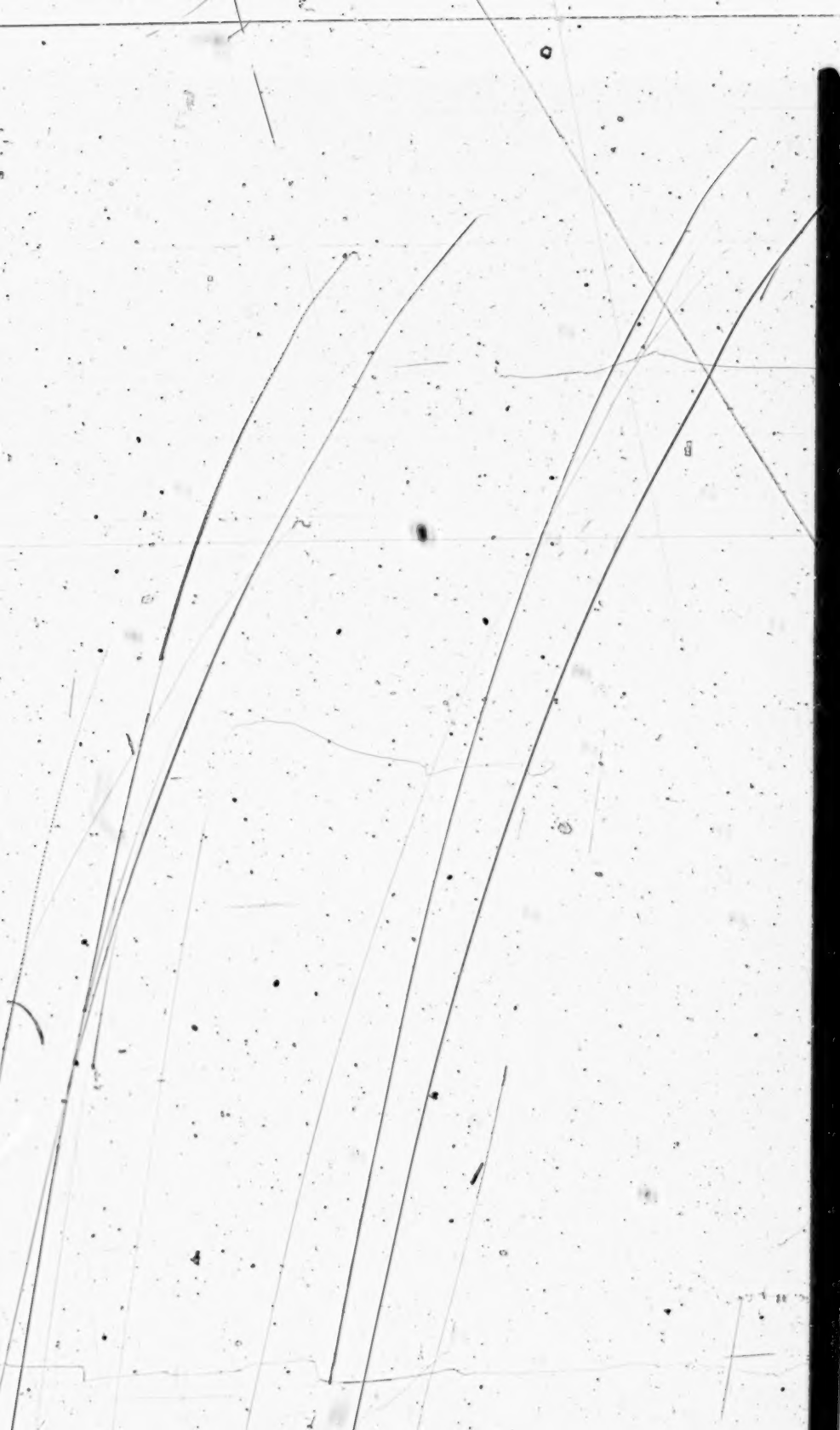

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Judicial Code, Section 237(a) (28 U. S. C. 344a), as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936), by the Act of January 31, 1928, c. 14 (45 Stat. 54), and by the Act of April 26, 1928, c. 440 (45 Stat. 466)	1
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Appellee.

APPELLEES' STATEMENT AS TO JURISDICTION.

Pursuant to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, appellee respectfully apprises this Honorable Court that in its considered opinion the present controversy presents a Federal question clearly within the contemplation of Section 237 (a) of the Judicial Code of the United States (28 U. S. C. 344 (a)), as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936), by the Act of January 31, 1928, c. 14 (45 Stat. 54), and by the Act of April 26, 1928, c. 440 (45 Stat. 466), and that this court has jurisdiction upon this appeal to review the judgment of the Supreme Court of the State of Washington.

Facts.

A complete chronological history of the case is presented in appellant's statement as to jurisdiction. Further elaboration would serve no useful purpose.

While we take a wholly contrary position to the appellant as far as the law is concerned and the applicability of the decisions bearing on the merits of the case, at the proper time controverting argument will be presented. Suffice it to say that we concur in appellant's contention that a Federal question is involved, namely, that of the alleged repugnance of the fish and game statutes of the State of Washington to the Stevens' Treaty of 1855, and which was passed upon by the Supreme Court of the State of Washington in reaching its judgment.

Authorities Believed to Sustain Jurisdiction on Appeal.

We think the pronouncement of this court in *Murray* v. *City Council of Charleston*, 96 U. S. 432, 24 L. Ed. 760, is directly in point. We quote from page 441 of the decision:

> "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell* v. *Randall* (10 Pet. 368), it was laid down, after a review of almost all our previous decisions, 'that it is not necessary the question should appear on the record to have been raised, and

the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.' This case was followed by *Armstrong et al.* v. *The Treasurer of Athens County* (16 id. 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it. See also *Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116, and *Furman* v. *Nichol*, 8 id. 44."

We believe, further, that the following cases sustain the jurisdiction of the Supreme Court of the United States:

In re Slaughter House Cases, 77 U. S. 273, 19 L. Ed. 915;

New Orleans & N. E. R. Co. v. *Scarlet*, 249 U. S. 528, 39 S. Ct. R. 369;

Longest v. *Langford*, 274 U. S. 499, 47 S. Ct. R. 668;

People of the State of New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. R. 61.

Importance of the Case.

On its face, this case may not appear to be of any special significance. The case, however, is of far greater importance than disclosed by the record. The particular treaty provision which furnishes the basis of the controversy is common to all the Indian treaties effectuated with the several tribes residing in the State of Washington as far as we are able to ascertain.

Four injunction suits are now pending in the Federal District Courts in Washington to restrain the State from interfering with Indian commercial fishing exploitations outside the reservations, based on the identical language of the Stevens' Treaty involved in the case at bar.

The interpretation of the Supreme Court of the State of Washington in an unbroken line of decisions is adverse to the Indians' position. On the other hand, Federal Courts in the Western District of Washington, in both the Northern and Southern Divisions, have granted temporary injunctions suspending the operation of the State laws in the waters over which the State of Washington has jurisdiction, and the District Court for the Western District of Washington, Northern Division, entered a permanent injunction on June 2, 1941 (*Makah Indian Tribe, et al.*, v. *B. F. McCauly, et al.*—Memo Decision filed May 1, 1941).

On June 22, 1939, District Judge J. Stanley Webster of the United States District Court for the Eastern District of Washington handed down an oral opinion, which was not officially reported, sustaining the right of the State, under the exercise of its sovereign police power, to reasonably regulate the taking of fish in the waters within its jurisdiction. (*United States of America in Behalf of Its Ward, Sampson Tulee* v. *C. R. House, Sheriff of Klickitat County, Washington.*) This decision is contrary to the holding of District Judge Bowen in the *Makah* case referred to above and is in full consonance with the rulings of the Supreme Court of the State of Washington.

We respectfully submit that a substantial Federal question is presented on this appeal and we concur with appellant that if for any reason the Supreme Court of the United States should conclude that it lacks jurisdiction to review the final judgment of the Supreme Court of the State of

Washington by appeal, the court should consent to undertake such a review as if on *certiorari* in accordance with Section 237 (c) of the Judicial Code (U. S. C. 344(c)).

Dated July 2, 1941.

Respectfully submitted,

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